

BEFORE THE DEPARTMENT OF PUBLIC  
HEALTH AND HUMAN SERVICES OF THE  
STATE OF MONTANA

In the matter of the adoption of New	)	NOTICE OF PUBLIC HEARING
Rule I and the amendment of ARM	)	ON PROPOSED ADOPTION
37.40.302, 37.40.307, 37.40.311, and	)	AND AMENDMENT
37.40.347 pertaining to Medicaid	)	
nursing facility reimbursement	)	

TO: All Interested Persons

1. On May 14, 2008, at 2:00 p.m., the Department of Public Health and Human Services will hold a public hearing in the Sapphire Room, 2401 Colonial Drive, Helena, Montana, to consider the proposed adoption and amendment of the above-stated rules.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process (including reasonable accommodations at the hearing site) or who need an alternative accessible format of this notice. If you need an accommodation, contact the department no later than 5:00 p.m. on May 5, 2008. Please contact Rhonda Lesofski, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena MT 59604-4210; telephone (406)444-4094; fax (406)444-1970; e-mail dphhslegal@mt.gov.

3. The rule as proposed to be adopted provides as follows:

**RULE I REIMBURSEMENT FOR UNIT OF GOVERNMENT NURSING FACILITIES** (1) Reimbursement for services provided by nursing facilities who are defined as a unit of government is limited to amounts consistent with economy and efficiency as provided in this rule and does not exceed the allowable cost of providing the services.

(2) For nursing facility services by a provider defined as a unit of government located in the state of Montana, the Montana Medicaid program will pay, for each Medicaid patient day, an interim per diem rate determined in accordance with this rule, minus the amount of the Medicaid recipient's patient contribution.

(3) Effective July 1, 2008, and in subsequent rate years, nursing facilities which are defined as units of government will be reimbursed in amounts not to exceed the lesser of:

(a) allowable cost; or

(b) the rate established under ARM 37.40.307.

(4) The interim rate for each facility will be determined as follows:

(a) Prior to the billing of July services each rate year, the department will determine an interim payment rate for each unit of government provider.

(b) The provider's interim payment rate will be determined based upon the lesser of:

(i) the department's estimate of actual allowable cost calculated from the most recently filed annual cost report and indexed to the midpoint of the rate year using the data resources incorporated (DRI) skilled nursing facility market basket index; or

(ii) the rate established under ARM 37.40.307.

(5) The department may consider, but shall not be bound by, the provider's cost estimates in estimating actual allowable costs. The provider's interim payment rate is an estimate only and shall not bind the department in any way in the final rate determination under (1) and (3).

(6) The provider's final rate as provided in (1) shall be determined based upon the provider's cost report for the rate year filed in accordance with ARM 37.40.346, after desk review or audit by the department's audit staff. The difference between actual allowable cost allocable to services to Medicaid residents, as limited in (4), and the total amount paid through the interim payment rate, as limited in (3) will be settled through the overpayment and underpayment procedures specified in ARM 37.40.347. In no event will the final rate exceed the amount established under ARM 37.40.307.

AUTH: 53-2-201, 53-6-113, MCA

IMP: 53-2-201, 53-6-101, MCA

4. The rules as proposed to be amended provide as follows. New matter is underlined. Matter to be deleted is interlined.

37.40.302 DEFINITIONS Unless the context requires otherwise in this subchapter, the following definitions apply:

(1) and (2) remain the same.

(3) "Cost limit" means the limit of Medicaid payments to governmentally operated nursing facility providers defined as units of government. For purposes of this subchapter, the cost limit is equal to the cost of providing services to Medicaid individuals that do not exceed an individual facility's cost of serving Medicaid individuals, consistent with economy and efficiency.

(3) through (20) remain the same but are renumbered (4) through (21).

(22) "Unit of government nursing facility" means a nursing facility that is operated by the state, a city, a county, a special purpose district, or another governmental unit that has taxing authority or direct access to tax revenues. Entities that do not have taxing authority, but do have direct access to tax revenues that are imposed by a parent or related unit of government are recognized as governmental.

AUTH: 53-2-201, 53-6-113, MCA

IMP: 53-2-201, 53-6-101, 53-6-111, 53-6-113, MCA

37.40.307 NURSING FACILITY REIMBURSEMENT (1) remains the same.

(2) Effective July 1, 2001, and in subsequent rate years, nursing facilities will be reimbursed using a price based reimbursement methodology. The rate for each facility will be determined using the operating component defined in (2)(a) and the direct resident care component defined in (2)(b):

(a) through (c) remain the same.

(d) The total payment rate available for the period July 1, ~~2007~~ 2008 through June 30, ~~2008~~ 2009 will be the rate as computed in (2), plus any additional amount computed in ARM 37.40.311 and 37.40.361.

(3) Providers who, as of July 1 of the rate year, have not filed with the department a cost report covering a period of at least six months participation in the Medicaid program in a newly constructed facility shall have a rate set at the statewide median price as computed on July 1, ~~2007~~ 2008. Following a change in provider as defined in ARM 37.40.325, the per diem rate for the new provider shall be set at the previous provider's rate, as if no change in provider had occurred.

(4) For unit of government facilities as defined in ARM 37.40.302, the provider's interim and final payment rates shall be as provided in [RULE I].

~~(4)~~ (5) For ICF/MR services provided by nursing facilities located within the state of Montana, the Montana Medicaid program will pay a provider as provided in ARM 37.40.336.

~~(5)~~ (6) In addition to the per diem rate provided under (2) or the reimbursement allowed to an ICF/MR provider under ~~(4)~~ (5), the Montana Medicaid program will pay providers located within the state of Montana for separately billable items, in accordance with ARM 37.40.330.

(6) through (12) remain the same but are renumbered (7) through (13).

AUTH: 53-2-201, 53-6-113, MCA

IMP: 53-6-101, 53-6-111, 53-6-113, MCA

37.40.311 RATE ADJUSTMENT FOR COUNTY FUNDED RURAL NURSING FACILITIES (1) through (4) remain the same.

(5) For purposes of this rule, a provider defined as a unit of government nursing facility is subject to a limit of reimbursement not to exceed cost, consistent with economy and efficiency. These facilities are limited to the lesser of the "cost limit" as defined in ARM 37.40.302 for purposes of this one time lump sum payment or the lump sum distribution calculated as provided in (3).

(5) through (7)(a) remain the same but are renumbered (6) through (8)(a).

AUTH: 53-2-201, 53-6-113, MCA

IMP: 53-6-101, 53-6-111, 53-6-113, MCA

37.40.347 COST SETTLEMENT PROCEDURES (1) through (6) remain the same.

(7) Nursing facilities defined as units of government must submit annually a cost report to the department that reflects the individual provider's cost of serving Medicaid recipients during the year.

(a) The department will review the cost report to determine that costs on the report were properly allocated to Medicaid, are in amounts consistent with economy and efficiency, and that Medicaid payments to the facility during the year did not exceed the provider's cost.

(b) The provider is responsible for any overpayment resulting from the procedures under (7) and (7)(a).

AUTH: 53-2-201, 53-6-113, MCA

IMP: 53-2-201, 53-6-101, 53-6-113, MCA

5. The Department of Public Health and Human Services (the department) is proposing the adoption of Rule I and the amendment of ARM 37.40.302, 37.40.307, 37.40.311, and 37.40.347 pertaining to Medicaid nursing facility reimbursement. These proposed rules and amendments are necessary to implement federal regulations and legislative funding beginning July 1, 2008.

## RULE I

The department is proposing a new Medicaid reimbursement rule for providers defined as "unit of government nursing facilities". This rule is necessary to implement federal regulations amended May 29, 2007 at 72 Federal Register 29748.

It provides for an interim 2009 rate with final reimbursement determined from cost reports. Medicaid reimbursement for a unit of government nursing facility cannot exceed allowable costs. The department believes the proposed rate methodology is the best possible compromise between administrative requirements and optimum reimbursement amounts.

### ARM 37.40.302

The proposed amendments to this rule would add definitions of "cost limit" and "unit of government nursing facility". The proposed definitions are intended to be the same as those in the applicable federal regulations.

### ARM 37.40.307

At the time of publication the department does not have all of the information necessary to calculate final payment rates for nursing facility providers according to the methodology at ARM 37.40.307. This methodology is explained below. The department intends to implement rates effective July 1, 2008. The final rates will be set according to final case mix information and funding levels authorized by the 2007 Montana Legislature.

The department will deliver rate schedules to all providers in advance of the rule hearing. The rate sheets will verify proposed rates and are intended to facilitate comments. They will be delivered as soon as case mix information, Medicaid utilization data, and other details necessary to compute accurate reimbursement rates become available. The rates will distribute the funding as necessary to meet the department goals of a price based system of reimbursement and will be computed so as to incorporate and implement legislatively appropriated funding levels.

### ARM 37.40.311

On May 29, 2007, the Centers for Medicare and Medicaid Services (CMS) adopted changes to 42 CFR Parts 433, 447, and 457 related to cost limits for providers operated by "units of government" and altering the definition of public status that would apply to nursing facility services. These changes were under a congressional moratorium for one year which will expire in May of 2008. Montana will be required to incorporate the CMS changes and update Medicaid nursing facility reimbursement rules and the rules related to rate adjustments to county funded rural nursing facilities. In addition, these rules impose a cost limitation on facilities that are operated by units of government and will require review of costs of operation submitted by these facilities and cost settlement if rates have been paid in excess of supported Medicaid costs.

#### ARM 37.40.347

These proposed rule changes would continue the funding and methodology for Direct Care Worker Wage Increases to be used only to raise direct care worker wages and related benefits through an increase in provider rates. Funds in the Direct Care Worker Wage Increase may not be used to offset any other wage increase mandated by any other laws, contracts, or written agreements which will go into effect at the same time as or after the Direct Care Worker Wage Increase. Funds in the Direct Care Worker Wage Increase must be used first to raise Certified Nurse Aide Direct Care Worker Wage and Benefits to \$8.50 an hour, including related benefits. Any remaining funds may be used only to raise wages and related benefits up to \$0.70 an hour for direct care workers and other low-paid staff. The department shall provide documentation that these funds are used solely for direct care worker wage increases. The documentation must include initial wage rates, wage rates after the rate increases have been applied, and wage rates every six months after the rate increases have been granted.

The 2007 Montana Legislature authorized the department to distribute funding from the health and Medicaid initiatives account in the state special revenue fund and the general fund to provide for a 2.5% rate increase for nursing facility providers in state fiscal year 2009.

#### Price Based System

For rate year 2009 (July 1, 2008 - June 30, 2009), the nursing facility per diem rate will be computed annually and will include components for operating costs and nursing costs.

The operating component includes both operating expenses and capital combined. This is the same rate for all nursing facilities and it represents 80% of the overall price. The nursing component will be adjusted for individual nursing facility acuity and is 20% of the overall price.

The minimum data set (MDS) case mix assessment data will be used in the computation of each facility's resident acuity. Each nursing facility's case mix index

will be calculated quarterly based upon a fixed point in time, using the most recent annual or quarterly MDS information. Nonclassifiable MDS assessment will be excluded from the computation of case mix indices during the transition period. Medicaid case mix indices for annual rate setting will be based on the most recent four quarter average of Medicaid Case Mix Indices (CMIs) for each nursing facility.

#### Price Based Rate Increase

Funding from I-149 tobacco tax initiative revenues, the state general fund, and federal funds of approximately \$3,581,868 will provide a 2.5% rate increase for nursing facility providers based on the state and federal share of funding for nursing facility reimbursement.

#### Sustained Payments for Direct Care Wage and Benefit Increases

The department will continue the funding implemented in FY 2008 to facilities to sustain wage and benefits increases that raised Certified Nurse Aide Direct Care Worker Wage and Benefits to \$8.50 an hour, including related benefits, and to sustain wages and related benefits up to \$0.70 an hour for direct care workers and other low-paid staff.

These funds will be distributed in the form of a direct care wage add on to the established price based rate set on July 1, 2009.

#### Cost Limits for Providers Operated by Units of Government

The proposed changes related to Nursing Facility Reimbursement and Rate Adjustment for County Funded Rural Nursing Facilities would incorporate federal law changes to 42 CFR Parts 433, 447, and 457. Only units of government are able to participate in financing of the nonfederal share of Medicaid expenditures and health care providers operated by units of government are limited to Medicaid reimbursement levels that do not exceed the cost of providing covered services to eligible Medicaid recipients. This cost limitation for units of government applies to the rate adjustments made through the "at risk" payment methodology as well as to the total calculated Medicaid rate set through the nursing facility reimbursement methodology.

For payments made to providers operated by units of government the proposed changes define a method for identifying and allocating costs based on annually submitted cost reports. The department will verify that costs on the report were properly allocated to Medicaid and will verify that Medicaid payments to the provider during the year did not exceed the provider's cost.

The proposed changes also identify a process for recovery of overpayments if it is determined that a provider operated by a unit of government received reimbursement exceeding the cost settlement.

### Alternatives Considered

If funding levels are not sufficient to continue a price based approach, the department will be faced with the following issues. Statewide occupancy rates are at 74% in Montana nursing facilities at the current time. At the same time, the care needs of the typical nursing facility resident are increasing. These residents are being admitted at an older age with medically fragile and complex care needs that can no longer be met in home or community settings. As these trends toward lower occupancy and increased acuity continue, it becomes more important than ever those nursing facility providers receive rate increases reflective of the increased cost of doing business. If Medicaid rates do not economically stabilize small rural providers of nursing facility services, they will find it more difficult to keep their doors open. Decreasing occupancy levels and the inability to predict the level of funding available will make it impossible to determine the best way to provide nursing facility services in their communities. Increased costs due to lower occupancy levels and unpredictability in the system of reimbursement are likely to be passed on to privately paying individuals.

Additionally, the Legislature continues to approve the use of local county matching funds as a source of revenue for nursing facility providers in order to maintain access to, and the quality of, nursing facility services.

After the moratorium expires on May 29, 2008, the federal regulations would limit the payments that can be made to government providers by capping reimbursement payments at individual facility cost, would redefine the facilities eligible to be public providers and would impose new restrictions on nonfederal funding sources. The result will be to narrow the sources of funds available to states to finance Medicaid expenditures.

The department proposes to limit reimbursement for government operated providers to amounts consistent with economy and efficiency by establishing a limit of reimbursement not to exceed cost. Since the rule would apply to services rendered on or after the moratorium, the department will be required to incorporate changes and update Medicaid nursing facility reimbursement rules related to these federal regulation changes as part of this notice. If the department did not incorporate these changes the state of Montana would be at risk for loss of federal financial participation to the extent rates for these providers exceeded their cost to deliver services to Medicaid recipients or to the extent Montana Medicaid was no longer in compliance with federal limitations.

There is a remote possibility that Congress will prevent CMS from implementing these rule provisions by extending the moratorium beyond the May 2008 date. If that occurs, these rule changes and limitations will not be implemented by the department.

### Estimated Financial/Budget Impacts

The total state and federal funding available for fiscal year 2009 is currently projected at \$152,868,877, including \$15,471,514 in state special revenue and \$28,686,071 in state general funds. The estimated total funding available for fiscal year 2009 for nursing facility reimbursement is estimated at approximately \$183,655,093 of combined state funds federal funds, including \$30,872,500 in patient contributions, \$407,999 in personal needs funding increases, and \$3,581,868 of new funding related to the 2.5% provider rate increase. Anticipated nursing facility care days for state fiscal year 2009 are estimated 1,165,000 days.

The estimated financial impact of the proposed provider funding is approximately \$2,655,000 in increased state funds, federal funds, and patient contributions in fiscal year 2009 over the FY 2008 funding levels.

The estimated total funding impact of the one time payments to 'at risk' nonstate government providers and other nursing facilities not determined to be 'at risk' has been appropriated at \$3,786,730 state special revenue funds and approximately \$11,275,590 in total appropriated funding for the nursing facility program.

The Centers for Medicare and Medicaid Services (CMS) has promulgated a new rule that narrows the sources of funds available in Montana to finance Medicaid expenditures under the inter-governmental transfer (IGT) program. This rule imposes cost limits for providers operated by "units of government" and alters the definition of "public" status. County funding and state lump sum distributions of the FY 2009 IGT program after the moratorium expires on May 25, 2008 would be limited. The rule would limit the payments that can be made to government providers through intergovernmental fund transfers by capping reimbursement payments at individual facility cost. The federal regulations redefine eligible public providers and impose new restrictions on nonfederal funding sources. The department proposes to limit reimbursement for government operated providers to amounts consistent with economy and efficiency by establishing a limit of reimbursement not to exceed cost.

The estimated impact on the reimbursement for the five facilities defined as "units of government" who would be limited under this rule proposal is a decrease in Medicaid funding of approximately \$1,051,391 in FY 2009. The estimated impact on the IGT program (using FY 2008 data) for nine additional facilities that would be eliminated from or limited in the "at risk" program for county facilities is a decrease in Medicaid funding of \$1,056,186. The total impact of the federal regulation change on funding available to finance Medicaid expenditures in Montana through the IGT program is \$2,107,577 in FY 2009.

6. The department intends the proposed rule changes to be applied effective July 1, 2008.

7. Interested persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to Rhonda Lesofski, Office of Legal Affairs, Department of Public Health



and Human Services, P.O. Box 4210, Helena MT 59604-4210, no later than 5:00 p.m. on May 22, 2008. Comments may also be faxed to (406)444-1970 or e-mailed to [dphhslegal@mt.gov](mailto:dphhslegal@mt.gov). The department maintains lists of persons interested in receiving notice of administrative rule changes. These lists are compiled according to subjects or programs of interest. To be included on such a list, please notify this same person or complete a request form at the hearing.

8. An electronic copy of this proposal notice is available through the Secretary of State's web site at <http://sos.mt.gov/ARM/Register>. The Secretary of State strives to make the electronic copy of this notice conform to the official version of the notice as printed in the Montana Administrative Register, but advises all concerned persons that, in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. The web site may be unavailable at times, due to system maintenance or technical problems.

9. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

10. The Office of Legal Affairs, Department of Public Health and Human Services, has been designated to preside over and conduct the hearing.

/s/ John Koch  
Rule Reviewer

/s/ John Chappuis for  
Director, Public Health and  
Human Services

Certified to the Secretary of State April 14, 2008.